tween the plaintiff and the defendant. I am unable to accept such a contention as O 15 r 6(2)(b) allows *any person* to be joined as party if it is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon. In the present action it cannot be said that the applicant has no rights, title and interest in the property by virtue of the deed of assignment. In para (ii) of O 15 r 6(2)(b) *any person* may be added as a party if in the opinion of the court it is just and convenient to determine any question that may exist or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter as between him and that party as well as between the parties to the cause or matter. Therefore if the relief sought by the plaintiff to get an order of specific performance in respect of the property were granted, in my opinion, the rights, title and interests of the applicant would be gravely and adversely affected.

In the case of *Hee Awa & Ors* v *Syed Muhammad Sazalay & Anor*[9] in respect of a running-down case, the Supreme Court at p 301 held that the learned judge exercised his discretion correctly when he allowed the application by the respondent who are already defendants in the action to intervene to add the motorcyclist as a co-defendant and the application falls squarely within O 15 r 6(2)(b) and the respondents have a choice either to proceed under O 15 r 6(2)(b) or O 16 (relating to third party proceeding).

As I am of the opinion that the assignment was an absolute one, not purporting to be by way of charge only, the defendant it would appear (without going into the merits) has no right to purportedly execute a sale and purchase agreement over the property to the plaintiff. Following the judgment of the Federal Court in *Nouvau's* case[3] I am of the opinion that the plaintiff is not competent to sue the defendant when the assignment is still subsisting and the applicant has a rightful claim to be made a party to this action if not for the substitution of its name for the defendant. It follows in my view, that this application satisfies the provision of O 15 r 6(2)(b) of the RHC.

In the premises, I would made the following orders:

(a) the application of the Public Bank (the applicant) to intervene is allowed;
(b) the proceeding in the sessions court vide Summons No Suit KG 357/1988/1 be stayed pending the outcome of this action;
(c) costs of this application be in the cause.

Application allowed.

Solicitors: *KC Wong & Associates; Ee & Lim; Foo, Kana & Co.*

Reported by *PS Ranjan*

Leng Hong Yuen v Escalation Enterprise Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) - CIVIL SUIT NO 23-3034-86
SITI NORMA YAAKOB J
21 APRIL 1989

Civil Procedure - Writ and statement of claim struck out - Whether undertaking given was made to the plaintiffs - Master and servant relationship between the defendants - Instructions given by one defendant to another

This is an appeal by the plaintiff against the senior assistant registrar's order allowing the sixth defendant's application to have the plaintiff's writ and amended statement of claim against them struck out with costs. The sixth defendant was the secretary of the first defendant and co-signatory of the bank account of the first defendant. The first defendant obtained a loan for $5.5m and authorized the sixth defendant to make certain payments from the loan to the plaintiff. An arrangement was made between the plaintiff and the first defendant and pursuant to it, the sixth defendant executed a written undertaking to pay the sums of $130,000 and $170,000 to the plaintiff.

When the bank loan was released, the first defendant together with the second, third, fourth and fifth defendants refused to honour their obligations as borrowers and guarantors and the plaintiff turned to the sixth defendant on the written undertaking. The sixth defendant disputed liability on the ground that the undertaking was given to their principals and not the plaintiff.

Held, dismissing the plaintiff's appeal:

(1) There is a master and servant relationship between the first and the sixth defendants as the latter acted only on the instructions of the first defendant and could only make payments from the bank account managed by them on those instructions.

(2) The debt due to the plaintiff was a personal debt of the first defendant as evidenced in the resolution and the sixth defendant was merely authorized to make the payment. They were never a party to the arrangement between the plaintiff and the first defendant. The undertaking was addressed to the first defendant and copied to the plaintiff. The payments to be made on the undertaking came from the first defendant's account. The sixth defendant is not, therefore, the debtors of the plaintiff but merely agents and no cause of action can be founded.

Legislation referred to
Rules of the High Court O 18 r 19(1)(a)

Dennis Xavier for the plaintiff.
Harcharan Singh for the sixth defendant.

Cur Adv Vult

Siti Norma Yaakob J: On 19 January 1988, the senior assistant registrar allowed the application of the sixth defendant to have the plaintiff's writ and amended statement of claim against them struck out with costs under O 18 r 19(1)(a) and under the inherent jurisdiction of the court on the ground that the amended statement of claim discloses no cause of action against them. The present proceedings before me is an appeal by the plaintiff against the senior assistant registrar's order.

It is not disputed that the sixth defendant is the secretary of the first defendant and the authorized co-signatory of the bank account of the first defendant. In November 1985, the first defendant obtained a loan of $9.5m from the Central Co-operative Bank ('CCB') and CCB agreed with the first defendant to release $5.5m from the loan as a first disbursement. The first defendant then authorized the sixth defendant, as their secretary, to make certain payments from out of $5.5m to two persons to whom the first defendant were indebted, one being the plaintiff.

The debts due to the plaintiff from the first defendant arose from two transactions. The first is for $130,000, being the consultation fees due for services rendered by the plaintiff in securing the entire equity of two companies on behalf of the first defendant. Payment for this debt also included any liability for income tax due on the consultation fees, which the first defendant had also agreed to pay. The liability for this debt has been sanctioned by a resolution dated 10 January 1986 passed by the board of directors of the first defendant.

The second transaction concerns a short term loan of $170,000 which had been granted by Kwong Yik Finance Berhad to the first defendant. In addition to the joint and several guarantee provided by the second to fifth defendants, as the directors of the first defendant, the plaintiff had also created a first legal charge of his land to the Finance Company. However, as the plaintiff had already charged the land to Koperasi Mewah Berhad, the land had to be redeemed first before the plaintiff can create a first legal charge in favour of Kwong Yik Finance. The redemption sum of $68,000 was settled from out of $170,000 loan approved by Kwong Yik Finance and in consideration of the plaintiff repaying the redemption sum of $68,000 to the first defendant, an agreement dated 25 February 1986 was entered into between the plaintiff and the first defendant, wherein the first defendant undertook to repay the $170,000 to Kwong Yik Finance in the following manner.

1) Upon the release by CCB of the first disbursement of $5.5m, the first defendant was to repay the plaintiff the $170,000 and all interests due and owing to Kwong Yik Finance to date of payment.
2) Notwithstanding any period of repayment set out in the loan agreement between the first defendant and Kwong Yik Finance, the first defendant was to authorize the sixth defendant to give a letter of undertaking that immediately upon receipt of the disbursement of $5.5m, the sixth defendant would pay out from the account of the first defendant the $170,000 plus any accrued interest to the plaintiff.

Pursuant to the above arrangement, the sixth defendant executed the written undertaking on 16 January 1986 to pay the plaintiff both the consultation fees of $130,000 and the $170,000. CCB released the $5.5m to the first defendant on 6 June 1986 and when the first to fifth defendants refused to honour their obligations to make the two payments to the plaintiff, as the principal borrowers and guarantors, the plaintiff turned to the sixth defendant for payment based on the written undertaking dated 10 January 1986. The sixth defendant dispute liability on the ground that the undertaking was given to their principals, the first defendant, and not to the plaintiff.

As the sixth defendant are the secretary of the first defendant, and they act on the instructions of the first defendant, there is a servant and master relationship between them. The sixth defendant manages the bank account maintained by the first defendant and being the authorized co-signatories, they can only make payments on the instructions of the first defendant. The sixth defendant was not made parties to any of the two transactions that resulted in the sum of $130,000 and $170,000 becoming due and payable to the plaintiff. As such, there is no contractual relationship between the plaintiff and the sixth defendant. The $130,000 represented the plaintiff's consultation fees for having successfully secured the purchase of the entire equity of two companies on behalf of the first defendant. The fact that the $130,000 is a personal debt of the first defendant is borne out by the resolution passed by the board of directors of the first defendant on 10th January, 1986, which clearly states that the first defendant shall pay the plaintiff that amount. This is again made clear by the first defendant in their letter dated 10 January 1986 addressed to the plaintiff, where at the second paragraph, the first defendant had this to say:

> We will authorize our secretary Secco Sdn Bhd to pay the abovementioned consultation fee directly to you from our company's bank account immediately upon receipt by us the first or initial disbursement of the approved loan by Co-operative Central Bank Bhd. We will cause our secretary above-mentioned to give you an undertaking to comply with the aforesaid.

The $170,000 short term loan was granted by Kwong Yik Finance Bhd to the first defendant but for its repayment, the first defendant had instructed their servants and agents, the sixth defendant, to make repayment to the plaintiff on the first defendant's behalf. This is clearly seen in the first defendant's letter of instructions to the sixth defendant, also dated 10 January 1986.

It is against this background that the sixth defendant's undertaking must be read and understood. This is so as the undertaking is addressed to the first defendant and copied to the plaintiff. The payments to be made pursuant to the undertaking are to come from the first defendant's account and not from the sixth defendant. From the peculiar facts of this case, the sixth defendant is not the

debtor of the plaintiff, for as the secretary of the first defendant, they are only agents of the first defendant, who are the principal debtors of the plaintiff. As no cause of action can be founded on the undertaking given by the sixth defendant, the senior assistant registrar was right in striking out the writ and amended statement of claim against the sixth defendant under O 18 r 19(1)(a) and under the inherent jurisdiction of the court and to that extent, I had dismissed the plaintiff's appeal with costs.

Appeal dismissed.

Solicitors: *Xavier & Chandran; Azman Davidson & Co.*

Reported by *Yap Shao Sin*